United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

801

BRIEF FOR APPELLANTS

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

Nos. 23,694, 23,695

UNITED STATES OF AMERICA, Appellee

v.

ERROL P. NEUMAN and MICHAEL E. NEUMAN, Appellants

Consolidated Appeals From the United States District Court
for the District of Columbia

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in a prosecution for the unlawful transfer of marijuana, by instructing the jury on the defense of entrapment, over objection, in the absence of any evidence thereof, and where defendants refused to assert that defense.

2. Whether the trial court erred, in a prosecution for the unlawful transfer of marijuana, in ruling that the defense of entrapment was raised in the absence of any evidence

thereof, and thereafter permitting the Government to introduce uncorroborated evidence of prior transfers of marijuana by defendant.

The pending case has not been previously before this Court.

References and Rulings. The trial court's ruling, over objection, that it would instruct on the issue of entrapment is set forth at pages 260-265 of the transcript. The trial court's ruling, over objection, that the Government was permitted to introduce evidence of prior transfers of marijuana is set forth at pages 228-9 of the transcript.

STATEMENT OF THE CASE

Although this is a case involving the transfer of marijuana and one in which the Government used an undercover agent, Appellants refused to assert the defense of entrapment, there being no evidence thereof. The trial court, over objection of Appellants' counsel, ruled that there was evidence of entrapment, thereafter permitted the Government to introduce evidence of prior, similar transfers of marijuana, and, over objection of Appellants' counsel, instructed the jury on the defense which Appellants had refused to assert.

The statement of the case is directed to the factual setting in which the issues on appeal are framed.

Defendants-Appellants Errol F. Neuman and Michael E. Neuman were convicted upon a single count indictment charging them with the unlawful transfer of marijuana in violation of 26 U.S.C. §4742(a).[1/] The indictment charged as follows:

> "On or about April 2, 1968, within the District of Columbia, Errol F. Neuman and Michael E. Neuman transferred 4,592 grams of marijuana to Joseph M. Arpaio, not in pursuance of a written order of said Joseph M. Arpaio, on a form issued for that purpose as provided by law."

Defendants-Appellants were tried before Judge Sirica and a jury on June 16, 17 and 18, 1969, and a verdict of guilty was returned on June 18, 1969.

On September 5, 1969, Appellants came before the Court for sentencing and were each sentenced to a term of two to six years and a fine of $10,000.00. Notices of appeal were filed on September 11, 1969 and the appeals were docketed as Nos. 23,694 and 23,695. By order of this Court of January 12, 1970, these appeals were consolidated.

1/ The indictment originally contained a second count, obtaining marijuana without having paid the transfer tax in violation of 26 U.S.C. §4744(a). This count was dismissed by the trial court prior to trial under Leary v. United States, 395 U.S. 6 (1969) and Covington v. United States, 395 U.S. 57 (1969). The judgment entered in this case contains a clerical error in setting forth the statute under which Appellants were convicted and it is suggested that it be corrected by this Court (JA12, 13)

Evidence At Trial

One of the two principal Government witnesses, Robert M. Stutman, an agent employed by the Federal Buearu of Narcotics and Dangerous Drugs, testified on direct examination that on April 2, 1968, at approximately 9:00 A.M., he received a telephone call from one Kenneth Galin (Tr. 40).[2/] Pursuant to that conversation, Agent Stutman, together with Joseph Arpaio, agent, Federal Bureau of Narcotics, (Tr. 40, 110), met Galin in the vicinity of Wisconsin and K Streets, N.W., in the District of Columbia and, following a conversation with Galin, proceeded to the parking lot at the Hot Shoppe located at 4110 Wisconsin Avenue, N.W., where they arrived at approximately 11:30 A.M. (Tr. 41-2). After waiting at that location for approximately fifteen minutes, Agent Stutman observed Appellant Errol Neuman walk toward the vehicle where Stutman was seated with Agent Arpaio and Galin. Appellant Errol Neuman entered the back seat of the automobile and was introduced to Agents Arpaio and Stutman. Agents Stutman and Arpaio asked Appellant Errol Neuman what he had and were told that he had ten pounds of hashish (Tr. 43). Thereafter, there was an argument about the price between Appellant Errol Neuman and Agents Arpaio and

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2/ The following abbreviations are employed for record references: (Tr.) designates the trial transcript, (JA) designates the joint appendix.

Stutman (Tr. 48), after which Appellant Errol Neuman said that he had ten pounds of hash and wanted to see the money (Tr. 52). Agent Arpaio removed from his pocket a flash roll. Appellant Errol Neuman stepped out of the car, raised his hands above his head and a few seconds later Appellant Michael Neuman walked over to the vehicle (Tr. 52). Appellant Errol Neuman introduced Appellant Michael Neuman to Agents Arpaio and Stutman and told him to get the "stuff" (Tr. 52-3). Michael Neuman left the group, and returned in a black Fiat which he parked approximately two or three parking places from the automobile in which Agents Arpaio and Stutman were seated (Tr. 53). Errol Neuman and Galin sat in the back seat of the agents' automobile and Michael Neuman entered the front seat of the automobile beside Agent Arpaio. Michael Neuman then handed Arpaio a green duffle bag (Tr. 53). Agent Arpaio opened the bag and observed five plastic bags containing what appeared to be a large quantity of hashish. Agent Arpaio took the bag and said he wanted to put it in the trunk at which time Appellant Errol Neuman said he wanted to be paid (Tr. 53). Michael Neuman and Agent Arpaio then walked to the trunk of the automobile and at that time Agent Stutman placed Errol Neuman under arrest (Tr. 54). Agent Stutman testified that no written order form was passed from Errol or Michael Neuman (Tr. 56).

On cross-examination Agent Stutman testified that he first met Kenneth Galin in approximately November, 1967 when he arrested Galin for transferring marijuana without an order form (Tr. 58-9), and that following his arrest, Kenneth Galin was an informer for the Government (Tr. 58) and acted in that capacity for five months (Tr. 58).

The trial court questioned the relevancy of this testimony (Tr. 59). At a bench conference and following a voir dire examination of Agent Stutman as to Galin's interest in assisting the Government, the court ruled that this was not evidence of entrapment if defendants acted voluntarily (Tr. 66). Defense counsel agreed, but urged that it could lead to evidence of entrapment depending upon what Galin did to induce defendants to sell to the Government agents (Tr. 66). The court ruled, and defense counsel agreed, that the evidence thus far did not show entrapment (Tr. 71). When defense counsel stated that he was not raising the defense of entrapment, the court refused to permit a voir dire examination of Galin as to his interest and bias (Tr. 73-4).

Agent Stutman further testified that after he received a telephone call from Kenneth Galin at approximately 9:00 A.M. on April 2, 1968, he instructed Galin to set up a

meeting with Errol Neuman for himself and Agent Arpaio to meet Errol Neuman later that morning (Tr. 75). Thereafter, he met with Galin at approximately 11:00 A.M. at Wisconsin and K Streets. At that meeting Galin was told to introduce Agents Arpaio and Stutman basically as the "money men" in the case who were purchasing the hashish (Tr. 79).

At this point, a discussion between counsel and the court ensued as to the proper scope of cross-examination of Agent Stutman relating to the instructions Agent Stutman gave to Kenneth Galin to facilitate the meeting with Appellant Errol Neuman. The court cautioned counsel that "evidence comes from the lips of witnesses, not from the question" (Tr. 81). The jury was excused and on the voir dire examination by defense counsel, Agent Stutman testified that he told Galin to portray himself and Arpaio as "money men", backers, or financiers (Tr. 86). Agent Stutman testified that they did not tell Galin to portray them as "tough guys" and when questioned specifically as to whether he told Galin to advise the Appellants that Galin's wife was being held as hostage by Agents Stutman and Arpaio, Agent Stutman said that he did not (Tr. 88-9). The court then said, "I don't see that you have established any evidence of entrapment yet. He has given negative replies to

your questions." (Tr. 88) Defense counsel agreed (Tr. 90), and further represented that he could not now question the witness on this issue in the presence of the jury (Tr. 92).

The jury returned and in their presence Agent Stutman testified that Appellant Michael Neuman delivered the hashish to Agent Arpaio (Tr. 100). Appellant Errol Neuman did not physically deliver anything to either Agent Stutman or Agent Arpaio (Tr. 103).

The Government then called Agent Joseph M. Arpaio who, in April of 1968, was agent in charge of the Washington district office of the Federal Bureau of Narcotics. He testified that he and Agent Stutman met Ken Galin at Wisconsin and K Streets, N.W., in the District of Columbia, on April 2, 1968, after which they drove to the Hot Shoppe on Wisconsin Avenue. At approximately 11:45 A.M., Errol Neuman approached the vehicle, was introduced by Galin, and was asked whether he had ten pounds of hashish (Tr. 112). Errol Neuman replied that he did and that the price was $8,000.00. After an argument as to the price (Tr. 112), Appellant Errol Neuman said that he wanted to see the money. At this time a flash roll was displayed. As testified by Agent Stutman, Appellant Errol Neuman left the vehicle, waved, and a few moments later Appellant Michael

Neuman approached the vehicle. He was introduced by Errol Neuman to Agents Stutman and Arpaio (Tr. 114-5). Errol Neuman then told Michael Neuman that "everything was all right" and to get the "stuff." (Tr. 115) Appellant Michael Neuman returned carrying an overnight bag, entered the agents' vehicle and handed the bag to Agent Arpaio. Arpaio opened the bag, observed a quantity of hashish, and showed the bag to Agent Stutman (Tr. 115). Michael Neuman and Agent Arpaio left the vehicle to place the bag in the trunk at which time Michael Neuman was placed under arrest by Agent Arpaio (Tr. 115-6). Agent Arpaio testified that he did not present any order form from the Treasury Department and no order form was seen by him at the time he received the overnight bag from Michael Neuman (Tr. 116-7).

On cross-examination Agent Arpaio testified that there was a distinction between marijuana and hashish in the lingo of undercover agents and that they were not the same (Tr. 129, 135). He further testified that they had a disagreement initially with Errol Neuman about the price and that at the time of the arrest of Appellant they were not asked for an order form (Tr. 132). Agent Arpaio was not questioned as to any manner relating to the issue of entrapment. His testimony related solely to the

transfer, to whom and by whom it was made, and an identification of the substance transferred.

The Government then called John Allen Steele, a chemist employed by the Internal Revenue Service Laboratory, specializing in the analysis of narcotics, dangerous drugs and marijuana. He testified that he received a duffle bag which contained five plastic bags of a brick-like material which he found upon chemical and physical examination to be hashish, a marijuana preparation (Tr. 147).

The Government rested and defendants' motion for judgment of acquittal based essentially on a constitutional attack upon 26 U.S.C. §4742(a)[3/] was denied.

The only witness called by the defense was Kenneth Galin. He testified as an adverse witness that he was arrested by Agent Stutman for a violation of the Marijuana Tax Act. He further testified that following his arrest Agent Stutman discussed with him the penalties involved, and that there was a possibility that he could help himself if he cooperated with Agent Stutman and other members of the Federal Bureau of Narcotics, although there were no promises made (Tr. 200-1).

3/ This issue was decided by the Supreme Court in Buie v. United States, ___ U.S. ___, No. 271, decided December 8, 1969.

Galin testified that he rendered certain services to Stutman, under Stutman's supervision, and identified to Stutman individuals who were willing to sell marijuana or hashish, and that he further assisted in setting up the sale (Tr. 201). Galin testified that he did this on five or six occasions for approximately seven or eight months, and that the last occasion was April 2, 1968, the matter that concerned this case (Tr. 202).

Galin testified that as a result of his activities, he was permitted to plead to a misdemeanor and was placed on probation (Tr. 202-3). He said that it was in his personal interest to arrange a meeting between Errol Neuman and Agents Arpaio and Stutman (Tr. 203). As to his activities on April 2, 1968, he testified that prior to his meeting with Errol Neuman and Agents Arpaio and Stutman, he met Errol Neuman alone at the same Hot Shoppe at which time Errol Neuman told him he had ten pounds of hash to sell (Tr. 204-5). Galin testified that he advised Errol Neuman that he did not have the money, and that he would have to contact his financiers, meaning Agent Stutman, who would have to be present since it was not Galin's money (Tr. 205). He testified also that he and Neuman made arrangements to return about 11:00 A.M. to complete the deal. Galin testified that he portrayed his financiers to Errol Neuman

as underworld types (Tr. 207), who were of coarse character, (Tr. 208) but denied that he said that they were criminals or that they were tough. He said that they were physically dangerous to a very limited degree, and that where there was a lot of cash on hand, there was always the possibility of a robbery (Tr. 208). When specifically asked whether Errol Neuman then said that he did not want to get involved, Galin replied, "Yes," that he persuaded Neuman to go ahead with it, but specifically denied persuading Errol Neuman by telling him that the money men were holding Galin's wife. When asked, "How did you persuade him to go ahead with it?" he answered, "I told him if we were going to have a transaction, my financier would have to be present." When asked again whether he told Errol Neuman that these people were holding his wife, and that Neuman had to go through with it or they would all be in trouble because they were tough operators, Galin categorically denied this (Tr. 210). He said that he described these people as being coarse, that there was always the possibility of a robbery, and that his men would have to be present since they did not trust him. When again questioned as to whether Errol wanted any part of the transaction, Galin said that he did not, and that he persuaded him to do it by telling

him that they could not have a transaction unless Galin's financier was present (Tr. 210-1). That, Galin testified, was the only type of persuasion used (Tr. 211).

Galin testified that his arrangement with Errol Neuman called for Neuman to sell Galin ten pounds of hashish for the money from Galin's financers (Tr. 215). When questioned as to whether or not an argument developed as to the price of the hashish and whether Agent Arpaio became so upset that Errol Neuman tried to tell Arpaio not to hurt Galin, Galin denied it (Tr. 221). The trial court then said in the presence of the jury, "What difference does it make whether defendant Neuman came to his defense, what difference does it make?" (Tr. 221) Galin said that Arpaio did not become violent or give any indication that he was going to get violent (Tr. 220-1). Galin further denied that he was so excited that he would tell Errol Neuman just about anything to get him to go through with the transaction (Tr. 223).

During the examination of Galin directed to whether Agent Stutman used a gun in making the arrest (Tr. 225), the trial court injected at the bench, "If I thought you had any real substantial evidence of entrapment which you are trying to make out of this case, I wouldn't hesitate to tell you."

(Tr. 226) The Government counsel then urged that the defense of entrapment had been raised and that he intended to explore the relationship [between Galin and Errol Neuman] (Tr. 226).

This colloquy concluded defense counsel's direct examination of Galin. On cross-examination by Government counsel, Galin testified that he first met Errol Neuman in New York. When questioned as to what happened on that occasion, defense counsel objected and went to the bench to advise the court that he was not raising the defense of entrapment, was not asking for an instruction, and that unless the court felt, as a matter of law, that there was sufficient evidence of entrapment, he objected to this testimony (Tr. 228).

The court indicated that it felt that defense counsel had opened up the relationship between Galin and Errol Neuman (Tr. 228). Defense counsel advised the court that he opened up the relationship as of that morning [April 2] and conspicuously omitted any prior references to either one [Galin and Neuman]. Defense counsel advised the court that it would be prejudicial to permit testimony proferred by the Government of prior sales by Errol Neuman to Galin (Tr. 228). The court then ruled that it would permit the testimony and would instruct on entrapment.

Galin then testified on cross-examination by Government counsel that prior to April, 1968, on two or three occasions he purchased marijuana from Errol Neuman, on one occasion approximately nine kilos at a price of $150 a kilo (Tr. 229-30). He further testified that in addition to these purchases, on one or two other occasions he saw other persons buying marijuana from Errol Neuman in New York City prior to April 2, 1968 (Tr. 230). On one of these occasions he saw three suitcases of marijuana delivered and emptied in about twenty minutes (Tr. 231). He testified that Errol Neuman was his source for marijuana in New York City (Tr. 231).

Galin further testified that on April 2, 1968, he received a telephone call from Errol Neuman at approximately 8:30 or 9:00 A.M. at his home (Tr. 231), and was told by Neuman to meet him at the Hot Shoppe on Wisconsin Avenue to discuss distributing ten pounds of hashish (Tr. 232). When questioned as to the reason Errol Neuman did not want to complete the transaction, Galin reiterated his earlier testimony that Neuman did not want to be face to face with the men who put up the money to buy the marijuana (Tr. 233).

Neither defendant testified and the defense rested. Defendants moved for judgment of acquittal at the conclusion of all the testimony. The motion was denied.

During the course of the discussion by counsel and the court as to the proposed instructions, counsel for defendants, when the matter of the instruction on entrapment arose, advised the court that he had not requested an instruction on entrapment and did not intend to argue entrapment to the jury (Tr. 259-60). Counsel further advised the court that there was no evidence of entrapment, and that Galin had testified that Errol Neuman was reluctant to go through with the transaction simply because it wasn't safe to do so in the presense of other people. Defense counsel urged that this was not entrapment, and that there was no evidence which would support an instruction or an argument to the jury on this defense (Tr. 260-1). The court considered the matter and stated that if defense counsel did not want the instruction on entrapment, it would consider not giving it (Tr. 261). However, the Government strongly urged that defense counsel had raised the question of entrapment by examining the Government agents as to whether Errol Neuman was told that Ken Galin's wife was being held, and that he had to make the sale (Tr. 262). No reference was made here to the fact that when this question was asked, it was categorically denied by agents Stutman and Galin. The court then reviewed the instruction on

entrapment, as submitted by the Government, and noted defense counsel's objection (Tr. 265).

The court advised defense counsel that since the entrapment instruction was going to be given, he would have the right to argue the defense of entrapment or not argue it. Counsel for the Government, in his closing argument, specifically referred to the prior sales and three suitcases of marijuana as evidence that defendants were "big dealers" (Tr. 276). Thereafter, counsel for defendants, in his closing statement, referred to the instruction which the court stated it was going to give on entrapment (Tr. 290), but was unable to draw upon any evidence in the case in support of the instruction, other than Ken Galin's interest in the prosecution (Tr. 288-91). The trial court instructed the jury on the defense of entrapment following an instruction on the elements of the offense charged in the indictment (Tr. 297-300).

ARGUMENT

I. THE FACTUAL SETTING.

This Court might well question how the issues in this case arose, postured as they are in most unusual circumstances. The answer is simply that the Government, after Ken Galin

testified, strongly urged and insisted that there now was evidence of entrapment, and that it was permitted to show prior transfers of marijuana by defendant Errol Neuman as evidence showing a predisposition to commit the crime charged in the indictment. The Government's contention was sustained by the trial court over defense counsel's objection and after counsel's assertions that (1) there was no evidence of entrapment; (2) that the defendants were not raising the defense of entrapment, there being no evidence to support it; (3) that no request for an instruction on the defense of entrapment would be made; (4) defendants' counsel would not argue entrapment to the jury; and (5) that the cross-examination of Galin was limited to the events of April 2nd.

II. IN THE ABSENCE OF ANY EVIDENCE OF ENTRAPMENT, THE TRIAL COURT MAY NOT INSTRUCT THE JURY ON THE DEFENSE OF ENTRAPMENT OVER DEFENDANTS' OBJECTION AND WHERE DEFENDANTS REFUSE TO ASSERT THAT DEFENSE.

A. The Trial Court May Not Instruct on a Theory of Defense Which is Not Supported by the Evidence, and to Which Defendants Object.

1. An Instruction on a Theory of Defense Must be Supported by the Evidence.

There was no evidence of entrapment in this case. Even under a process of "extensive picking and disregarding"[4/]

4/ Brooke v. United States, 128 U.S.App.D.C. 19, 23, 385 F.2d 279, 283 (1967).

most favorable to the Government, the evidence here would not have justified the court's instruction on the defense of entrapment had it been requested by defendants.

The Government undercover agent, Ken Galin, testified that he received a telephone call from defendant Errol Neuman early the morning of April 2, following which the defendant Errol Neuman met Galin at the Hot Shoppe and offered to sell ten pounds of hashish to Galin. The uncontradicted evidence in this case was that the transfer was initiated by Errol Neuman without any inducement whatsoever on the part of the Government and Galin. Two agents from the Federal Bureau of Narcotics testified on behalf of the Government to no conversations with Errol Neuman that under any interpretation could possibly raise an issue of entrapment and, on cross-examination, denied giving Galin any instructions as to how to persuade defendant Errol Neuman to meet them. Counsel's questions directed to these two Government agents in order to elicit some evidence of entrapment were answered in each instance in the negative. The only evidence which might in any way relate to persuasion or inducement by the Government centered on Ken Galin's testimony that Errol Neuman was prepared to make the transfer to him

but was reluctant to make the transfer in the presence of two individuals whom he did not know. When questioned whether Errol Neuman wanted any part of the transaction, Galin testified that he persuaded Neuman to go through with the transaction by telling him that unless Galin's "financiers" [Agents Arpaio and Stutman] were present, there could be no transaction. Galin then testified that Errol Neuman later met him at the Hot Shoppe, as previously arranged, at which time Michael Neuman, on a signal from Errol, delivered hashish to Agent Arpaio in the presence of Galin, Errol Neuman and Agent Stutman.

Those cases in which this Court has considered the propriety of the trial court's refusal to instruct on the defense of entrapment necessarily support the rule that an instruction on entrapment may not be given in the absence of any evidence thereof. Brooke v. United States, 128 U.S.App.D.C. 19, 385 F.2d 279 (1967); Smith v. United States, 118 U.S.App.D.C. 38, 331 F.2d 784 (en banc 1964); Redfield v. United States, 117 U.S.App.D.C. 231, 328 F.2d 532 (1964), cert. denied 377 U.S. 972 (1964); Berry v. United States, 116 U.S.App.D.C. 375, 324 F.2d 407 (1963), cert. denied 376 U.S. 959 (1964); Johnson v. United States, 115 U.S.App.D.C. 63, 317 F.2d 127 (1963).

In Lopez v. United States, 373 U.S. 427 (1963), rehearing denied, 375 U.S. 870 (1963), the Supreme Court said:

" ... Before the issue of entrapment can fairly

> be said to have been presented in a criminal prosecution there must have been at least some showing of a kind of conduct by Government agents which may well have induced the accused to commit the crime charged." 373 U.S. at 434-5.

There was in this case no evidence of conduct by Government agents which may well have induced the defendants to commit the crime charged. There was no evidence that the Government or its agents approached Errol Neuman to induce the alleged transfer. To the contrary, the evidence is uncontradicted that Errol Neuman first approached the Government agent. Cf. Brooke v. United States, supra. There was no evidence that there was a "frame-up," Cf. Smith v. United States, supra, or a "plant," Cf. Brooke v. United States, supra, or that the Government agents used anything other than the artifice and strategem of assuming the role of marijuana dealers. This is not to say that an attempt was not made to elicit evidence of entrapment. However, questions directed to this issue by defense counsel were categorically denied and, as the trial court properly ruled, "evidence comes from the lips of witnesses, not from the question." (Tr. 81).

Appellants have framed the first issue of instructing the jury on a theory of defense in the absence of any evidence thereof as a predicate for showing the prejudice which arises

by the very nature of an entrapment instruction.

2. The Instruction of Entrapment Assumes the Commission of the Offense Charged.

The theory of the defense of entrapment assumes the commission of the elements of the offense charged. Indeed, this Court said in Brooke v. United States, 128 U.S.App.D.C. 19, 385 F.2d 279 (1967):

> " ... Nonetheless, an instruction on that subject [entrapment] was both unnecessary and improper unless there was an evidentiary basis for finding that, entrapment aside, Appellant was guilty of one or more of the offenses charged." 128 U.S.App.D.C. at 22, 385 F.2d at 282.

It necessarily follows that the instruction in this case, requested by the Government and authored by it (JA 9), following as it did the theory of entrapment permits the jury to assume and indeed the jury may not consider it unless they find that the defendants were guilty of the act charged in the indictment. Hamilton v. United States, 221 F.2d 611, 614 (5th Cir. 1955); Rodriguez v. United States, 227 F.2d 912, 914 (5th Cir. 1955); Marko v. United States, 314 F.2d 595 (5th Cir. 1963); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965). The defense is similar to confession and avoidance, Martinez v. United States, 373 F.2d 810 (10th Cir. 1967), and the jury is advised by the instruction, quite simply, that absent the commission of the

crime, there can be no entrapment. Ortiz v. United States, 358 F.2d 107 (9th Cir. 1966), cert. denied, 385 U.S. 861 (1966), rehearing denied, 385 U.S. 983 (1966).

> This Court has said:
>
> " ... The entrapment doctrine operates, not to negate a component of the offense, but to exonerate from criminal liability, because of overriding consideration, one who otherwise would be guilty of the offense. Entrapment, as a legal phenomenon, comes into play only where all essential elements of the offense exist." (Citations omitted) Brooke v. United States, supra, 128 U.S.App.D.C. at 22, 385 F.2d at 282.

Certainly defendants are prejudiced by an instruction on a theory of defense unsupported by the evidence, which assumes the commission of the offense charged, and which may well lead the jury to conclude, where there is no evidence of entrapment, that the crime was committed as charged.

B. The Trial Court May Not Instruct on Entrapment As A Defense Where Defendants Refuse to Assert the Defense.

Defendants' counsel advised the court, having failed to elicit any evidence of entrapment, of their intention not to raise the defense. Counsel, further advised the court at the time the Government urged that the defense had been raised by calling to the stand a Government undercover agent, that again no evidence of entrapment had been elicited and that

again defendants were not raising this defense. Defense counsel further stated that defendants would not request such an instruction and represented that no argument to the jury on this theory of defense would be made.

The trial court ruled that there was evidence of entrapment and that defendants must suffer the evidentiary penalty of the jury being advised that the defendant Errol Neuman had previously engaged in transfers of marijuana. This assumes, since the ruling was made over objection of counsel, either that the trial court in its discretion has the right to raise the defense over objection of counsel or that the Government may raise a defense and thereafter be permitted to discredit it.

The cases, of course, do not support such a contention. All of the cases in which the issue of the defense of entrapment has arisen and to which this Court has addressed itself, have concerned the right of the accused to assert the defense. In no case has this Court or any other court spoken of the right of the Government to assert the defense of entrapment and thereafter impose the evidentiary penalty that follows from introducing prior similar transactions. In Sherman v. United States, 356 U.S. 369 (1958), the concurring

opinion of Mr. Justice Frankfurter, joined in by Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan, in speaking of whether the defense of entrapment should be directed to the conduct of the Government agent or the predisposition of the accused, impliedly recognized that the right to assert the defense of entrapment was necessarily the defendant's, for the Court spoke in terms of the defendant's foregoing the claim of entrapment.

> "The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." 356 U.S. at 382.

The danger or risks of asserting the defense is a matter which defense counsel must balance against the evidence to support a finding of entrapment. Only the defendant has the right to make that decision, and when due consideration is given to the risks involved, the defense may not be urged by the Government over objection of defense counsel, particularly in the absence of strong evidentiary support.

III. IN THE ABSENCE OF ANY EVIDENCE OF ENTRAPMENT IN A PROSECUTION FOR THE UNLAWFUL TRANSFER OF MARIJUANA, THE TRIAL COURT MAY NOT PROPERLY RULE THAT THE DEFENSE HAS BEEN RAISED AND THEREAFTER PERMIT THE GOVERMENT TO INTRODUCE EVIDENCE OF PRIOR TRANSFERS OF MARIJUANA BY A DEFENDANT.

A. Evidence of Prior Transfers of Marijuana by a Defendant May Not be Introduced as Evidence of a Predisposition to Transfer Marijuana in the Absence of Evidence of Entrapment.

The dangers and risks to a defendant in asserting the defense of entrapment were recognized by this Court in Hansford v. United States, 112 U.S.App.D.C. 359, 303 F.2d 219 (en banc 1962). There the Court said:

> "This 'searching inquiry', another feature of the decisions, opens the door to conduct of the accused antedating the charge on trial. The focus of the case is likely to be drawn away from the conduct of the Government agent and concentrated on the prior conduct of the defendant." 112 U.S.App.D.C. at 363, 303 F.2d at 223.

In this case the Government strongly urged over objection of defense counsel, that the defense had raised the issue of entrapment in order that it might impose the evidentiary penalty of introducing prior, similar transfers of marijuana. It urged that the issue was raised by the form of the question, for certainly there is in this case no testimony upon which entrapment could be based. The questions

specifically referred to by the Government were denied by the witnesses.

B. Uncorroborated Testimony of a Government Agent as to Prior Transfers of Marijuana by a Defendant May Not be Introduced as Evidence of a Predisposition to Transfer Marijuana.

The prejudicial error in this case is not necessarily predicated on the absence of evidence of entrapment. Here the Government intorduced, through the cross-examination of its agent, Ken Galin, after he was called by defense counsel, uncorroborated testimony of prior transfers of marijuana by defendant Errol Neuman on two or three occasions. This testimony was neither corroborated through contemporaneous official reports nor by any other witness. The incidents were alleged to have occurred in New York City during the two or three months preceding April 2nd as a result of a number of trips to New York City by Galin. He further testified that during this same period on one or two other occasions he saw other "buys" made from Errol Neuman. On one occasion he testified he purchased about nine kilos and on one occasion on which he saw other "buys" made from Errol Neuman, it involved three suitcases of marijuana. In the absence of any official records or report by Galin or corroboration of his testimony, defendant

Errol Neuman had no opportunity to defend against these charges and no means of combatting them except by electing to take the stand. The dates of these offenses were not specified, the location was not set forth, no arrests were made and no indictment or conviction supported the testimony.

This Court held in Hansford v. United States, 112 U.S.App.D.C. 359, 303 F.2d 219 (en banc 1962), under similar circumstances that the rebuttal testimony of a police officer as to prior sales, not having been corroborated by the production of a contemporaneous report or otherwise substantially corroborated, was so prejudicial as to outweigh the probative value of testimony on predisposition.

> "The record reveals no available contemporary official report of the incident by the officer. A single alleged incident, nine months prior to the charge on trial, is involved. There was no arrest for the alleged prior offense and thus no indictment or conviction. In these circumstances the defendant had no opportunity to prepare to defend against this other charge and no means of combatting it, save by his own unsupported testimony in denial of the officer's testimony. In this particular factual situation we hold that the testimony of Officer Hutcherson as to the September 1959 incident, not having been corroborated by the production of a contemporaneous report or otherwise substantially corroborated, was so

T.W. SEARS, Clerk

ENTRAPMENT

EVIDENCE HAS BEEN INTRODUCED THAT LAW ENFORCEMENT OFFICIALS INDUCED THE UNLAWFUL CONDUCT WITH WHICH THE DEFENDANTS ARE CHARGED

IF AN OFFICIAL OF THE GOVERNMENT, EITHER ACTING DIRECTLY OR THROUGH AN AGENT, INDUCES OTHERWISE UNWILLING PERSONS TO COMMIT AN UNLAWFUL ACT AND THOSE PERSONS WOULD NOT HAVE COMMITTED THE ACT BUT FOR THIS INDUCEMENT, THOSE PERSONS ARE NOT CRIMINALLY RESPONSIBLE FOR THEIR ACT.

ON THE OTHER HAND, IF THE GOVERNMENT DID NOT INDUCE THE CONDUCT, BECAUSE THE DEFENDANTS WERE PREDISPOSED OR READY TO COMMIT THE OFFENSE AND WERE MERELY AFFORDED AN OPPORTUNITY BY THE GOVERNMENT TO DO SO, THEY MAY BE FOUND GUILTY, PROVIDED THAT THE GOVERNMENT HAS PROVED ALL ESSENTIAL ELEMENTS OF THE OFFENSE AS TO EACH DEFENDANT BEYOND A REASONABLE DOUBT.

THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT AS TO EACH DEFENDANT THAT THE DEFENDANT WAS NOT INDUCED TO COMMIT THE UNLAWFUL ACT WITH WHICH HE IS CHARGED, BECAUSE HE WAS MERELY AFFORDED AN OPPORTUNITY TO COMMIT THE OFFENSE, BEING PREDISPOSED OR READY TO DO SO

INDUCEMENT MAY TAKE DIFFERENT FORMS, SUCH AS PERSUASION, FRAUDULENT REPRESENTATIONS, THREATS OR OTHER COERCIVE TACTICS, OR HOLDING OUT THE PROMISE OR HOPE OF REWARD. HOWEVER, LAW ENFORCEMENT OFFICIALS ARE NOT PRECLUDED FROM UTILIZING ARTIFICE AND STRATAGEM, SUCH AS THE USE OF DECOYS OR UNDERCOVER AGENTS, TO APPREHEND A PERSON ENGAGED IN A CRIMINAL ENTERPRISE, PROVIDED THAT THEY MERELY AFFORD OPPORTUNITIES OR FACILITIES FOR THE COMMISSION OF AN OFFENSE BY THOSE ALREADY PREDISPOSED OR READY TO COMMIT IT

IT IS FOR YOU TO DETERMINE ON THE BASIS OF ALL THE EVIDENCE WHETHER THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT THAT IT DID NOT INDUCE THE DEFENDANTS TO COMMIT THE OFFENSE WITH WHICH THEY ARE CHARGED. IF YOU HAVE A REASONABLE DOUBT WHETHER OR NOT THE DEFENDANTS WERE INDUCED TO COMMIT THE OFFENSE BY THE ACTIVITY OF LAW ENFORCEMENT OFFICIALS OF THE GOVERNMENT, OR THEIR AGENTS, YOU MUST FIND THEM NOT GUILTY.

IN DETERMINING THIS QUESTION, YOU MAY CONSIDER EVIDENCE OF THE PRIOR CONDUCT OF THE DEFENDANTS, AND PRIOR ACTS OF SIMILAR CHARACTER THEY MAY HAVE COMMITTED, IF ANY. YOU MAY CONSIDER SUCH EVIDENCE, HOWEVER, SOLELY IN CONNECTION WITH YOUR DETERMINATION OF THEIR PREDISPOSITION OR READINESS TO COMMIT THE OFFENSE WITH WHICH THEY ARE NOW CHARGED. IT IS NOT EVIDENCE THAT THEY ACTUALLY COMMITTED THE OFFENSE WITH WHICH THEY ARE NOW CHARGED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on April 23, 1968

The United States of America	]	Criminal No. 894-68
v.	]	Grand Jury No. 1345-68
Errol F. Neuman Michael E. Neuman	]	Violation: 26 U.S.C. 4742(a) (Transferring Marihuana Without Payment of Tax)

The Grand Jury charges:

On or about April 2, 1968, within the District of Columbia, Errol F. Neuman and Michael E. Neuman transferred 4,592 grams of marihuana to Joseph M. Arpaio, not in pursuance of a written order of said Joseph M. Arpaio, on a form issued for that purpose as provided by law.

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

Foreman.

JA 11

United States District Court
FOR THE
DISTRICT OF COLUMBIA

United States of America

v.

1. ELIOT F. NEUMAN

CRIMINAL

No. 894-68

FILED

SEP 5 1968

ROBERT M. STEARNS, Clerk

On this 5th day of September, 1969 came the attorney for the government and the defendant appeared in person and by his attorney, M. David Povich, Esquire

IT IS ADJUDGED that the defendant upon his plea of not guilty and by verdict of guilty has been convicted of the offense of

TRANSFERRING MARIHUANA UNLAWFULLY

IN VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 4744(a)

as charged in Count One

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO (2) YEARS TO SIX (6) YEARS, and said defendant is directed to pay a fine in the amount of TEN THOUSAND DOLLARS ($10,000.00) unless the defendant is relieved of payment of said fine in the manner provided by law.

~~IT IS ADJUDGED~~ that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

United States District Judge.

The Court recommends commitment to the Bureau of Prisons study case from the standpoint of confinement in a suitable Youth Institution.

Clerk.

[1] Insert "by [name of counsel], counsel" or without counsel: the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number _____" if required [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to expiration of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be imprisoned until payment of the fine or fine and costs or until he is otherwise [illegible]

J412

Judgment and Commitment (Rev. 2-68) Cr. Form No. 23

United States District Court
FOR THE
DISTRICT OF COLUMBIA

United States of America

v.

2. MICHAEL KELLEN

CRIMINAL No. 891-68

FILED

SEP 5 1969

ROBERT M. STEARNS, Clerk

On this 5th day of September, 1969 came the attorney for the government and the defendant appeared in person and by his attorney, E. David Rovich, Esquire

It Is Adjudged that the defendant upon his plea of not guilty and by verdict of guilty has been convicted of the offense of

TRANSPORTING MARIHUANA UNLAWFULLY

IN VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 4744(a)

as charged in Count One

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

TWO (2) YEARS TO SIX (6) YEARS, and said defendant is directed to pay a fine in the amount of TEN THOUSAND DOLLARS ($10,000.00) unless the defendant is relieved of payment of said fine in the manner provided by law.

It Is Adjudged that:

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

United States District Judge.

The Court recommends commitment to the Bureau of Prisons study case from the standpoint of confinement in a suitable Youth Institution.

Clerk.

[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert: (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a verdict of guilty," or (4) "nolo contendere," as the case may be. [3] Enter (1) sentence or sentences, specifying any count(s) as to which sentence(s) are to run concurrently or consecutively and, if consecutively, when each is to commence, or (2) any other authorized disposition.

JA 13

NOTICE OF APPEAL, CRIMINAL

10-31

United States District Court for the District of Columbia

UNITED STATES OF AMERICA

vs.

ERROL NEUMAN

Criminal No. 894-68

FILED

SEP 11 1969

ROBERT M. STEARNS, Clerk

NOTICE OF APPEAL

Name and address of appellant

Errol Neuman
526 Rutland Ave.
Teaneck, New Jersey

Name and address of appellant's attorney

David Povich
1000 Hill Building
Washington, D.C. 20006

Offense 26 U.S.C. §4742(a)

Concise statement of judgment or order, giving date, and any sentence
Judgment of guilty
September 5, 1969, sentenced to a term of two to six years and a fine of $10,000

Name of institution where now confined, if not on bail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

September 11, 1969
Date

Appellant

David Povich
Attorney for Appellant.

JA 14

NOTICE OF APPEAL, CRIMINAL

1541

United States District Court for the District of Columbia

UNITED STATES OF AMERICA

vs.

MICHAEL NEUMAN

FILED

SEP 11 1969

Criminal No. 894-68

ROBERT M. STEARNS, Clerk

NOTICE OF APPEAL

Name and address of appellant

Michael Neuman
526 Rutland Ave.
Teaneck, New Jersey

Name and address of appellant's attorney

David Povich
1000 Hill Building
Washington, D.C. 20006

Offense 26 U.S.C. §4742(a)

Concise statement of judgment or order, giving date, and any sentence

Judgment of guilty
September 5, 1969, sentenced to a term of two to six years and a fine of $10,000

Name of institution where now confined, if not on bail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

September 11, 1969
Date

Appellant

David Povich
Attorney for Appellant.

JA 15

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Nathan J. Paulson
CLERK

UNITED STATES OF AMERICA Appellee	
v.	Appeal No. 23694
ERROL F. NEUMAN Appellant	
UNITED STATES OF AMERICA Appellee	
v.	Appeal No. 23695
MICHAEL E. NEUMAN Appellant	

MOTION TO CONSOLIDATE

Appellant Errol F. Neuman, Appeal No. 23694, and Appellant Michael E. Neuman, Appeal No. 23695, move by and through their attorney David Povich to consolidate their appeals.

Appellants are brothers who were tried as co-defendants in a single trial before Judge Sirica and were convicted of violating 26 U.S.C. §4742(a), sale of marijuana in violation of the Marijuana Tax Act. The issues on appeal arose out of

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D. C. 20006

AREA CODE 202
638-6565

MOTION GRANTED

Nathan J. Paulson, Clerk

By A. L. Stevens
Deputy Clerk

the same trial and are identical as to both Appellants. Appellants' attorney has been advised by John Terry, Assistant U. S. Attorney, Appellate Division, that he has no objection to this motion.

For the foregoing reasons, it is respectfully requested that the appeals in Appeal No. 23694 and Appeal No. 23695 be consolidated.

Respectfully submitted,

David Povich
1000 Hill Building
Washington, D. C. 20006
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was delivered by hand this 9th day of January, 1970, to John Terry, Esquire, Assistant U. S. Attorney, Appellate Division, United States Court House, Washington, D. C. 20001.

David Povich

LAW OFFICES
LLIAMS & CONNOLLY
1000 HILL BUILDING
SHINGTON, D. C. 20006
AREA CODE 202
638-6849

JOINT APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia

Nos. 23,694, 23,695

ERROL F. NEUMAN and MICHAEL E. NEUMAN, Appellants

v.

UNITED STATES OF AMERICA, Appellee

Consolidated Appeals From the United States District Court
for the District of Columbia

INDEX

	E. MICHAEL MEYER	E.N.David Povich 1000 Hill Bldg.		CHARGE 26 USC 7206(2). 7206(2)
		BOND 1. 6-25-69--Personal $5,000.00 526 Rutland Ave. Teaneck, N.J. United Bond. Co. 2. 6-25-69-Personal $5,000.00 United Bond. Co. 526 Rutland Ave. Teaneck, N. J.	DATE FILED 8/21/68	BOND Personal $5,000.00 526 Rutland Ave. Teaneck, N.J. Personal $5,000.00 526 Rutland Ave. Teaneck, N. J.

DATE	1, 2. PROCEEDINGS
1968Jun 20	PRESENTMENT AND INDICTMENT FILED C/C (2 Counts)
1968Jul 5	1,2: BW, Bond Revoked SIRICA, J. (Rep.-N.Sokal)
July 19	1,2: BW of 7/5/68 withdrawn; ARR set for 7/26/68. SIRICA, J.
1968Jul 23	1,2: BW issued 7-5-68 returned unexecuted at request of SIRICA,J.
1968Jul 26	1,2: ARR: PNG, Bond, Paul Wolf, Esq. for arraignment only. SIRICA,J. (Rep.-N.Sokal) C/T
1968Aug 9	2: App'n. David Povich entered
Aug 9	1,2: B.W., bond revoked. (failed to appear for ascertainment of counsel' (Rep: J. Maher) CURRAN, C.J.
Aug 19	1: Appearance of H. David Povich. Filed
Aug 21	2: Order specifying methods and conditions of rel, KISCARAS, U.S. COMM. (N) $1,000 personal bond filed.
1968Aug 22	1: Mo for bill of particulars; P&A; C/S
1968Aug 22	2: Mo to dismiss; P&A; C/S
1968Sep 4	2: Transcript of proceedings & copy of warrant, Dist of N.J., U.S. Comm., Theodore C. Kiscaras, Rutherford, N.J. dated 8-14-68 PB--$1,000 bond filed. APP: 526 Rutland Ave Teaneck, New Jersey. Micro 9-10-68
1968Sep 27	1,2: Motion of defts for bill of particulars, heard, argued and Denied; Motion of defts to dismiss, heard, argued and TAKEN UNDER ADVISEMENT; H. David Povich, Esq. PRATT,J. (Rep.-P.Harper) C/T
(CONTINUED)	

JA1

CRIMINAL DOCKET

United States District Court for the District of Columbia

United States vs. 1. [illegible] 2. [illegible] Cr. No. 931-68 Supplemental Page No. 1

Date		Proceedings
1968Oct	2	EACH: Order denying mo of defts for dismissal of indict. without prejudice to being raised after decision of Supreme Court. (N) GRAY,J.
1968Oct	4	Supplemental memo of P&A in support of mo to dismiss indict.
1969Jan	3	Order withdrawing BW issued 8-9-68 and that deft Errol F. Neuman be released from custody in Teaneck,New Jersey. SIRICA,J. (N)
1969Jan	10	1: Appearance bond in the sum of $1,000.00 taken by deft. Order for release of deft on per recog in the sum of $1,000.00 U.S. Commissioner, Theodore C. Kiscamas, Dist of N.J.
1969Mar	5	1: Record of proceedings before U. S. Commissioner, Dist. of New Jersey. Bond set at $1,000.00. Appearance Bond in the sum of $1,000.00 taken by deft.
1969Mar	15	1,2: Mo for insp of G.J.Min and to dismiss indictment; C/S: P & A
1969Mar	31	1,2: Mo to remove case from ready calendar and Affidavit
1969May	6	1,2: Deft's oral motion for trial date cont. DENIED, David Povich, Esq. CURRAN, C.J. (Rep.-P.Harper)
1969May	12	1&2:Govt's oral mo for two (2) weeks cont. (5-26-69) GRANTED. CURRAN, C.J. (Rep-.J.Fisher)
1969June	16	EACH: mo to dismiss Count 2-heard & Granted.
		EACH: JURY SWORN ON VOIR DIRE; Jury and 4 alternate jurors sworn; trial begun; recessed until 9:30 a.m. June 17, 1969; Each: Bond. David Povich,Esq. SIRICA,J. (Rep-N.Sokal) C/F
1969Jun	18	EACH: TRIAL RESUMED: same jury; alternate jurors excused; accommodations issued for 12 jurors and 2 marshals: VERDICT: GUILTY AS CHARGED (Ct.1-Transferring Marihuana unlawfully); jury discharged; Bond of $5,000.00 set; Defts rel. to custody of counsel for 1 wk. to obtain surety; defts. to surrender passports tomorrow morning at Federal Bureau of Narcotics in New York; Ref. C/F
		Copy of Indictment given to Jury. FILED
		Form of Verdict as to Errol F. Neuman. FILED
		Form of Verdict as to Micheel E. Neuman. FILED
		Notes of Jury (2) FILED
		Supplemental P & A in support of Motion to Dismiss Indictment following Leary V. United States. FILED. Instructions of Government (2) FILED
		Instructions of Defense (Index and 7) FILED
		SIRICA, J. Rep-N.Sokal, S.Hatch, P. Harper David Povich,Esq.
1969Jun	17	1,2: TRIAL RESUMED;same jury; recessed until 9:30 a.m. 6-18-69; Bond. SIRICA, J. Rep-N.Sokal David Povich,Esq.

(CONTINUED)

JA 3

CRIMINAL DOCKET

United States District Court for the District of Columbia

United States vs. 1. ERROL F. NEUMAN
2. MICHAEL NEUMAN

Cr. No. 674-68 ... Supplemental Page No. 2

	Date		Proceedings
	1969 Jun	25	1. Recog in sum of $5,000.00 taken with United Bonding Ins. Co.
	1969 Jun	25	2. Recog in sum of $5,000.00 taken with United Bond. Ins. Co.
	1969 Jun	25	FAH: Counsel for defendants inform Court defendants have surrendered passports to proper authorities; defendants permitted to remain on $5,000.00 bond pending imposition of sentence; $5,000.00 bond for each defendant posted by United Bonding Insurance Co. David Povich, Esq.
			CURRAN, D.J. Rep-J.Maher
	1969 Jul	3	1. ORDER FOR RETURN OF CASH DEPOSIT to Errol F. Neuman, 526 Rutland Ave., Teaneck, New Jersey, 07666. (N) SIRICA, J.
			2. ORDER FOR RETURN OF CASH DEPOSIT to Michael Neuman, 526 Rutland Ave., Teaneck, New Jersey, 07666. (N) SIRICA, J.
	1969 Jul	15	2. Paid to Errol F. Neuman $500.00 by U. S. Treasury check #3933 pursuant to order of Court filed July 3, 1969.
	1969 Jul	15	1. Paid to Michael Neuman - $500.00 pursuant to Order of Court filed 7-3-69
	1969 Sept	5	EACH: Ct. 1 (Trans. Marihuana Unlawfully) : 2Yrs. to 5 Yrs. and fine of $10,000.00; fine is to be paid unless deft. Rel. for non-payment of fine in manner provided by law; Court Recom. Bur. of Prisons study case from standpoint of confinement in suitable youth institution: Defts. Rel. on same $5,000. bond pending appeal. J & C's , filed. David Povich, Esq., SIRICA, J. (Rep-R. Quick)
	1969 Sep	11	1: Notice of Appeal from Sentence of 9-5-69. $5.00 paid and credited to U. S.
	1969 Sep	11	2: Notice of Appeal from Sentence of 9-5-69. $5.00 paid and credited to U. S.
	1969 Sep	12	1: Copy of docket entries sent to USCA & U.S.Atty. Copy of Notice of Appeal sent to USCA, U.S.Atty, atty & deft.
			2: Copy of docket entries sent to USCA & U.S.Atty. Copy of Notice of Appeal sent to USCA, U. S.Atty, atty & deft.
	1969 Oct	16	TR PRO of 6-16-69; Vol.I ; pages 1-106; Court's copy; Rep.N.Sekal
			TR PRO of 6-17 & 18, 1969; Vol.II, pages 107-266; Court's copy; Rep.N.Sekal
	1969 Oct	16	Motion for extension of time in which to file record on appeal and order granting an extension of 20 days. c/s SIRICA, J.
	1969 Oct	16	~~Motion for extension of time in which to file record on appeal--c/s~~ (In error)
26	1969 Nov	3	1, 2: Motion for extension of time in which to file record on Appeal C/S/
37			Order extending time for filing an appeal to and including 11-21-69 granted. Sirica, J. (N)
38	1969 Nov	19	No. 1, 2: TRANS OF PRO June 18, 1969, Pages 1 - 357. Clerk's Copy . Reporter - Hatch and Harper
39	1969 Nov	19	Each: Deft. Exhibit 1 filed

CRIMINAL No. [illegible]

UNITED STATES

vs.

(23) 1. [illegible] (with supplement on 68,000.1 [illegible] Interstate Gas Transportation of Counterfeit)

(24) 2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

CHARGE: Vio. 26 USC 5742a, [illegible] 2 Counts

G. Atty.: [illegible]

5-31-68
1. Bond: $ 5,000 , Surety: Personal Bond, , Atty: [illegible]
521 Building Inc.,
2. Bond: $, Surety: Counsel, Inc. , Atty: [illegible]
5-31-68
3. Bond: $ 5,000 , Surety: Personal Bond, , Atty: [illegible]
521 Building Inc.,
4. Bond: $, Surety: Counsel, Inc. , Atty: [illegible]
5. Bond: $, Surety: , Atty: [illegible]

DATE	COURT CLERK'S MEMORANDUM	JUSTICE
6-20-68	PRESENTMENT AND INDICTMENT FILED	
6-20-68	FILED: Copy of Plaintiff's mailed to def'ts. Cert. Filed.	
7/5/68	Each B/W ordered + issued (Rep W Sobel)	Sirica J
7/19/68	Ea: B/W withdrawn; Arr set for 7/24/68	Sirica J.
[illegible]	[illegible]	[illegible]
Aug 22	Gov't motion for continuance of arraignment Rep J. Nolan	Current, CJ
	Oral motion of def'ts counsel for additional Eight (8) Days to file motions granted (Jack Nolan)	Current, CJ.
Sept 27 1968	Motion to Dismiss Indictment and Motion to Suppress Evidence and Motion to Dismiss taken under advisement (Rep J. Hayes)	Pratt, J.

JA4

June 16 [illegible]
on voi[illegible]
Berum[illegible]
Pond.

June 17 BACH: [illegible]
June [illegible]

June 18 BACH: [illegible]
jury [illegible]
as cha[illegible]
defts. [illegible]
summo[illegible]
Feder[illegible]
Vogt [illegible]

[illegible]
Popo, Stilley Hotel
Liquidos Pobal &
Bayside Bowling Proms, Inc.

[illegible] -- BACH: [illegible]
respe[illegible]
on 5/[illegible]
Rep: [illegible]

Counsel.

[illegible]
Pres[illegible]

SIPICA, J.

SIPICA, J.

SIPICA, J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED IN OPEN COURT

Holding a Criminal Term

JUN 20 1968

Grand Jury Sworn in on April 23, 1968 ERN M. STEARNS, CLERK

The United States of America	:	Criminal No. 801-68
v.	:	Grand Jury No. 1345-68
Errol F. Newman Michael B. Newman	:	Violation: 26 U.S.C. 4742(a) 4744(a) (Transferring Marihuana Unlawfully; Obtaining Marihuana Without Payment of Tax)

The Grand Jury charges:

FIRST COUNT:

On or about April 2, 1968, within the District of Columbia, Errol F. Newman and Michael B. Newman transferred 4,592 grams of marihuana to Joseph M. Arpaio, not in pursuance of a written order of said Joseph M. Arpaio, on a form issued for that purpose as provided by law.

SECOND COUNT:

On or about April 2, 1968, within the District of Columbia, Errol F. Newman and Michael B. Newman, being transferees of marihuana required to pay the transfer tax imposed by Section 4741(a), Title 26, United States Code, obtained about 4,635.97 grams of marihuana without having paid such tax.

Attorney of the United States in
and for the District of Columbia

A TRUE BILL: William B. Elliott

Foreman.

JA6

United States District Court for the District of Columbia

FILED

JUL 26 1968

ROBERT M. STEARNS, Clerk

UNITED STATES

vs.

#1. ERROL F. NEWMAN

Defendant

CRIMINAL No. 921-68

CHARGE Fed. Narcotic Laws

PLEA OF DEFENDANT

On this 26th day of July, 1968,
the defendant Errol F. Newman, appearing in
proper person and by his attorney Paul Wolf, Esq., being
arraigned in open Court upon the indictment, the substance of the charge being
stated to him, pleads Not Guilty thereto.

By direction of

JOHN J. SIRICA
Presiding Judge
Criminal Court #---

Present:

United States Attorney

By _____
Assistant United States Attorney

ROBERT M. STEARNS, Clerk

By _____
Deputy Clerk

_____
Official Reporter

JA 7

United States District Court for the District of Columbia

FILED

JUL 26 1968

ROBERT M. STEARNS, Clerk

UNITED STATES

vs.

#2. MICHAEL NEUMAN

Defendant

CRIMINAL No. [illegible]

CHARGE Fed. Narcotic Laws

PLEA OF DEFENDANT

On this 26th day of July, 19 68,

the defendant Michael Neuman, appearing in

proper person and by his attorney Paul Wolf, Esq., being

arraigned in open Court upon the indictment, the substance of the charge being

stated to him, pleads Not Guilty thereto.

By direction of

JOHN J. SIRICA

Presiding Judge
Criminal Court # ---

Present:

United States Attorney

By [illegible]
Assistant United States Attorney

ROBERT M. STEARNS, Clerk

By [illegible]
Deputy Clerk

M. Sokal
Official Reporter

JA 8

REPLY BRIEF FOR APPELLANTS

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia

Nos. 23,694, 23,695

UNITED STATES OF AMERICA, Appellee

v.

ERROL F. NEUMAN and MICHAEL E. NEUMAN, Appellants

Consolidated Appeals From the United States District Court
for the District of Columbia

DAVID POVICH
Counsel for Appellants

1000 Hill Building
Washington, D. C. 20006

I N D E X

* * *

TABLE OF CASES

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

Nos. 23,694, 23,695

UNITED STATES OF AMERICA, Appellee

v.

ERROL F. NEUMAN and MICHAEL E. NEUMAN, Appellants

Consolidated Appeals From the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANTS

I. As to Appellee's Counterstatement of the Case.

Appellee's counterstatement of the case neglects to note that the issue of entrapment was first presented to the court during the cross-examination of Agent Stutman concerning the circumstances under which Ken Galin first began working for the Government as an informer (Tr. 58). The trial court questioned the relevancy of this testimony (Tr. 59), and ruled during a voir dire examination thereafter of Agent Stutman that the circumstances under which Ken Galin first began to work on

behalf of the Government was not evidence of entrapment, if Defendants acted voluntarily (Tr. 66). Counsel for Appellants agreed, but urged that Galin's interest in assisting the Government following his arrest for transferring marijuana could lead to evidence of entrapment depending upon Galin's conduct in arranging for Appellants to meet with the Government agents for the purpose of transferring marijuana. At this point Appellants' counsel requested that a voir dire examination be held of Galin to elicit whether this personal interest subsequently led to conduct on his part which induced Appellants to transfer hashish without an order form. Counsel for Appellants requested that a voir dire examination of Galin be held inquiring into his conduct in arranging for the meeting which is the subject matter of this case (Tr. 71). The trial court agreed to hold a hearing out of the presence of the jury (Tr. 71). The Government, however, urged that such an examination was inappropriate unless Appellants' counsel first advised the court that he was raising the defense of entrapment (Tr. 71-2). The court accepted the Government's position stating that if Appellants' counsel advised the court that he was raising the defense of entrapment, the court would permit counsel to question Galin as to what Galin hoped to gain by cooperating with the Government in acting as an informer in this case and further into his conduct with

respect to arranging for the meeting between Appellant Errol Neuman and Agents Stutman and Arpaio (Tr. 72). Appellant's counsel stated that he did not wish to raise the defense of entrapment (Tr. 74). The court then denied Appellants' request for a voir dire examination of Galin in the absence of Appellants' counsel stating that he was raising the defense of entrapment (Tr. 74).

II. Appellee Has Avoided the Issues Presented.

Appellee in its brief at page 11 states that it does "not treat the issue of when an instruction on entrapment must be given nor do we consider when or whether the prosecution may raise the defense of entrapment over an accused's objection." Appellants presented for review these issues on the record of this case. The trial court, over objection of counsel and after being advised that Appellants were not raising the defense of entrapment, would not request an instruction on that defense and would not argue entrapment to the jury, ruled that the Government was permitted to introduce evidence of prior transfers of marijuana as evidence of a predisposition to commit the offense charged, and that the court would give an instruction on entrapment as submitted and requested by Appellee.

Appellee acknowledges on page 11 of its brief that

Appellants had the burden of alleging inducement before the issue of entrapment was raised, although it is not clear how heavy that burden may be, comparing Berry v. United States, 116 U.S.App.D.C. 375, 324 F.2d 407 (1963), cert. denied, 376 U.S. 959 (1964), with Johnson v. United States, 115 U.S.App.D.C. 63, 317 F.2d 127 (1963). In one instance Appellee characterizes the defense of entrapment as an affirmative defense under Sorrells v. United States, 287 U.S. 438 (1932), (Appellee's Br. 9), with the burden of proof on Appellants, and concludes by urging that Appellants may satisfy that burden notwithstanding their election not to raise that defense, not to request an instruction on it, and not to argue it to the jury, simply because an informer was involved in the alleged sale, citing Hansford v. United States, 112 U.S.App.D.C. 359, 360, 303 F.2d 219, 220 (1962) (en banc). In essence, Appellee is urging in this case that where there is evidence that an informer participated in the transaction which is the subject matter of the prosecution, there is "always the possibility of inducement" (Appellee's Br. 11) and consequently notwithstanding the dangers which this Court spoke of as inherent in the defense of entrapment, Brooke v. United States, 128 U.S.App.D.C. 19, 385 F.2d 279 (1967), and Hansford v. United States, supra, the Government may raise the defense over objection and thereafter, under the guise of showing predisposition

introduce evidence of prior criminal acts of the accused.

In no case cited by Appellee has the Court permitted prior criminal conduct as evidence of predisposition and instructed on entrapment over objection of the accused and the assertion that the defense was not being raised. This case represents an attempt by the Government to bootstrap the introduction of prior criminal conduct through the Government's assertion, over objection, that the defense of entrapment had been raised.

Having been permitted by the court to introduce evidence of prior criminal conduct, Appellee urges that the Government properly presented to the court an instruction on entrapment "to inform the members of the jury as to how they were to treat the evidence of prior transfers" (Appellee's Br. 14). Appellee's position completely ignores Appellants' objection to giving an instruction on entrapment. The instruction on that defense may not be considered by the jury unless and until they find that the accused is guilty of the act charged. By its very nature it is a defense of confession and avoidance. As this Court stated in Brooke v. United States, supra at 22:

> "Entrapment as a legal phenomenum comes into play only where all essential elements of the offense exist."

Appellee does not suggest that in having erred once in permitting the introduction into evidence of prior criminal conduct the court necessarily had to err again to cover that mistake by instructing the jury on that defense over objection so as to properly evaluate the highly prejudicial evidence. Appellee's position in urging that the instruction was proper to explain this evidence of prior criminal activity fails to recognize that the instruction, by its very nature, instead of giving guidance, compounds the prejudice to the accused.

III. Appellee's Contention that Prior Criminal Acts Were Admissible as Part of the "Searching Inquiry" Permitted Under Hansford.

Appellee appears to recognize in its brief at page 12 that the error urged by Appellants with respect to the introduction into evidence of past offenses may be prejudicial notwithstanding its contention that there was evidence of entrapment in this case. Appellee therefore has sought to distinguish this Court's opinion in Hansford v. United States, supra. In that case the Government rebutted an entrapment defense urged by defendant through the introduction into evidence of an incident which occurred nine months prior to the time at issue and which involved the transfer of heroin in an amount in excess of the amount allegedly transferred in the case on trial. Moreover, in that case the testimony was not

corroborated by a written report or otherwise substantially corroborated. Appellee at pages 12-13 of its brief seeks to distinghish Hansford in noting that the prior criminal conduct admitted into evidence in this case took place three to four months prior to the transfer at issue and in amounts consistent with the amount transferred in this case. Appellee urged that these are factors which distinguish Hansford from the case presently before the Court. Such is not the case. Although the alleged transfers testified to by Galin took place three to four months prior to the case at issue, as distinguished from a nine-month period in Hansford, that is the only distinguishing fact. In this case, as in Hansford, the amount of the prior transfer was far in excess of the amount of hashish alleged to have been transferred in the case at trial. Galin testified that on one of the prior occasions three suitcases were delivered and emptied in about twenty minutes (Tr. 231). In the case presently before the Court a small canvas handbag was alleged to have contained hashish. Moreover, there was no memorandum or report of Galin, just as there was none in Hansford, corroborating the transfers which Galin alleged took place three or four months prior to the transfer at issue and at the very time these alleged transfers took place Galin was working under Agent Stutman (Tr. 201). Indeed, there was nothing in evidence

which substantially corroborated Galin's testimony as to the prio transfers. Galin was permitted to testify, over objection, to this conduct on the part of Errol Neuman on two or three occasion which took place three to four months prior to the transfer at issue. The dates of the offenses were not specified, the locations where the transfers took place were not set forth, no arrests were made, no reports were made and the Government could offer nothing to corroborate this testimony notwithstanding the fact that during this period Galin was admittedly operating as their agent. Appellants had no opportunity to defend against these charges and to combat this evidence except by electing to take the stand and possibly thereby waiving the error alleged here in permitting the Government to introduce this testimony of prior criminal acts. The charges were so broad and the locations and dates so general that even if Appellants had taken the stand, it is unlikely that Appellants could have been prepared to refute the charges except by merely asserting a general denial. This is the situation which this Court in Hansford found prejudicial and sought to prevent. Certainly these allegations and this testimony as to prior transfers of marijuana under the circumstances were so prejudicial to the accused as to outweigh the probative value of the testimony on the issue of predisposition

particularly where Appellants did not in the defense of this case raise that issue as did the defendant in Hansford.

IV. As to Appellee's Assertion That There Was no Prejudice Arising From the Introduction of Prior Transfers of Marijuana.

Appellee notes on page 13 (n. 8 of its brief) that the only prejudicial effect that the introduction of the prior transfers could have had would be to refute the defense of entrapment and that therefore the effect was not prejudicial since Appellants state they have no claim of entrapment warranting submittal of that issue to the jury. Appellee misunderstands Appellants' argument with respect to the use of uncorroborated prior criminal conduct as evidence of predisposition to commit the offense charged and the dangers which surround the presentation of that testimony to a jury as outlined by this Court in Hansford. The prejudice arises in the danger that the jury will not distinguish between evidence of the act charged in the indictment and evidence concentrating on the prior criminal conduct of the accused. The evidentiary penalty which the court imposed on Appellants by permitting Appellee to introduce prior transfers of marijuana was clearly prejudicial and requires reversal.

Respectfully submitted

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